> "If an 'agreement' or waiver does not bind the Government, a repudiation (in accord or not in accord with standards of review practiced within the Internal Revenue Service) by the Government of the 'agreement' or waiver could hardly render it binding."

However, even if the agreement is not binding, the Commissioner's repudiation must nonetheless be in accord with the standards of review promulgated in the Treasury Regulations since taxpayers and tax officials alike are bound by the Regulations. *Hugoton Production Co. v. United States*, 315 F.2d 868 (Ct. of Claims 1963); *McCord v. Granger*, 201 F.2d 103 (1952); *Pacific National Bank v. Comm. of Int. Rev.*, 91 F.2d 103 (1937).

Therefore, the motion to dismiss Counts II and III will be overruled.

The motion to dismiss Count IV also will be overruled.

OPINION OF JUDGE THOMAS GRANTING GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT ON COUNTS II, III AND IV.

United States District Court for the Northern District of Ohio Eastern Division,

November 29, 1966:

Reported in 266 F. Supp. 824.

THOMAS, J.

Defendant United States of America moves for summary judgment dismissing Counts II, III, and IV of the plaintiff's complaint. Count I, not involved in the present motions, asks refund of an additional estate tax of $475,848.95 paid in full on May 22, 1963 by the executors of the Estate of Helen Wade Greene, deceased, and interest of $90,131.25 paid in full on August 12, 1963. Helen Wade Greene died on December 25, 1958.

The additional estate tax was assessed upon property in the amount of $1,322,580.70 conveyed by the decedent, Helen Wade Greene, to a trust established by the decedent on August 15, 1957 for the benefit of her daughter Helen Greene Perry. The Commissioner of Internal Revenue added this trust property to the decedent's taxable estate, purporting to act under Section 2035 of the Internal Revenue Code of 1954, 26 U.S.C. § 2035 (1964). This addition increased the value of the combined taxable estate to $8,618,787.43. Originally the executors paid an estate tax of $3,172,328.88, computed on the estate without the addition of the trust property. This payment is not in litigation. On grounds other than the merits, Counts II, III, and IV claim illegality of the assessment of collection of the additional tax, but each count seeks recovery of the additional tax paid.

Plaintiffs The Cleveland Trust Company and A. Dean Perry, co-executors of the Estate of Helen Wade Greene, decedent; in support of Counts II, III, and IV, move for production of certain Government documents, identified at a deposition but not disclosed. The identified documents prepared in the office of the Cleveland District Director include the Informal Conference report, reports by the Estate Examiner in the Audit Division, reports of the Conferee, reports of conferences by or with the Chief of the Audit Division, memoranda of certain conversations, and miscellaneous internal documents. The documents sought also include one prepared for and one prepared by, the Regional Commissioner in Cincinnati, and a report of the Appellate Division.

A motion of the defendant Government to dismiss Counts II, III, and IV of the complaint was previously overruled. It is now contended that Counts II, III, and IV present no genuine issue as to any material fact. Absence

of a materially factual question can make summary judgment timely in a tax refund action. *Steiner v. Nelson*, 259 F.2d 853, at 858 (7th Cir. 1958).

Count II of the complaint contends that

> By reason of the failure and refusal of the Commissioner of Internal Revenue to abide by the Treasury Regulations and published procedures, the assessment and collection of such additional federal estate tax and interest, aggregating $565,980.20, is erroneous and illegal, and the retention of said sum by the United States is wrongful.

In considering the legal sufficiency of these claims of Count II, undisputed facts forming the setting for these claims, will be recounted. By a so-called ten-day letter, on October 10, 1961 a Federal Estate Tax Examiner "notified the executors of certain adjustments proposed that would increase the federal estate tax payable by the estate, including, along with other adjustments, the determination that the conveyance of property to the trust on August 15, 1957, was made by the decedent in contemplation of her death."

In accordance with procedures published by the Commissioner of Internal Revenue, 26 C.F.R. § 601.105, and Rev. Proc. 60-24, 1960-2 *Cum. Bull.* 60-24, later to be discussed, an Informal Conference was held on November 28, 1961. The Informal Conference and relevant occurrences before and after are chronicled in the April 3, 1962 letter from the attorneys for the executors to the District Director of Internal Revenue, attention Louis H. Florian, Estate Tax Examiner. The Conference Coordinator forwarded

> a statement of the Examining Officer's proposed adjustments and suggesting that a conference might be arranged with Conferee Robert P. Pool. These

proposed adjustments indicated that, in addition to some minor changes in valuation, there was a major difference resulting from the disallowance of a claim for a discount from the quoted price of several large holdings of stocks, due to blockage.

In the statement

> The question of the taxability of the transfer made by the decedent on August 15, 1957, for the benefit of her daughter, Helen Greene Perry, was also raised.

Prior to the conference with Mr. Pool

> In the course of your audit * * * there were filed an affidavit of Dr. Joseph T. Wearn, the decedent's physician and Dean of Western Reserve University Medical School for many years, an affidavit of Dr. Austin B. Chinn, who attended Mrs. Greene at the time of her death, an affidavit of Miss Julia Raymond, who was a house guest of the decedent at the time of her death, and affidavits of Helen Greene Perry, A. Dean Perry, Harold T. Clark, Janet H. Stuart, Sherman E. Lee and Donald M. DeMuth, setting forth facts showing the motive for the transfer and clearly establishing that the motive was not contemplation of death.

Referring to the Informal Conference, the letter further states

> the question of the motive for the gift was thoroughly investigated. The estate representatives presented a written statement setting forth the basis of the claim that the gifts were not made in contemplation of death. Oral arguments were made by both sides. Thorough questioning was conducted by both Mr. Pool, as Conferee, and by yourself as the Examining Officer.

It is further stated that

> Several weeks after the conference you presented to us a Form 890-B, waiving restrictions on the assess-

ment of a deficiency of $77,781.53. This was thereafter signed by The Cleveland Trust Company as Co-Executor and delivered to you on December 26, 1961. This deficiency was based upon a determination that the gift made for the benefit of the decedent's daughter referred to above was not made in contemplation of death and allowed some discount for blockage but not as much as was claimed by the estate.

Form 890-B is an "Estate Tax Waiver of Restrictions on Assessments and Collections of Deficiency and Acceptance of Overassessment." Contemporaneous with its execution, on or about December 12, 1961, The Cleveland Trust Company and A. Dean Perry, Co-Executors, signed a collateral agreement. This agreement delivered to the defendant United States of America on December 26, 1961, states, in part, that the undersigned

> hereby agree that in the event of the acceptance by or on behalf of the Commissioner of Internal Revenue of a proposed settlement of the estate tax liability of the Estate of Helen Wade Greene, and as a part of the consideration for such settlement, our cost bases for income tax purposes for the following shares of stock, which were held by The Cleveland Trust Company, Helen Greene Perry, and A. Dean Perry, as Trustees under an Agreement dated September 1, 1948, as amended from time to time and restated August 15, 1957, shall be as follows: [thereafter appear the number of shares and the share value fixed for the identified stocks.]

It appears that the agreed deficiency of $77,781.53 together with interest in the amount of $8,307.71, or a total of $86,089.24, was paid by check to the Internal Revenue Service on January 3, 1962. On January 19, 1962 the sum was assessed by the Commissioner. Refund of this money has never been requested nor has the Internal Revenue Service offered to refund the money.

Referring to Form 890-B, as executed, the April 3, 1962 letter of executors' counsel states that "we all expected that there would be a final Treasury letter well in advance of March 10, 1962." However, as the letter recites, in a conference with Estate Examiner Florian on April 2, 1962

> you informed us that the Internal Revenue Service had changed its position in regard to a proposed settlement of the federal estate tax liability and now asserts that a transfer made August 15, 1957 for the benefit of the decedent's daughter is taxable and that the Executors are therefore free to withdraw the Form 890-B * * * You also informed us that a partial withdrawal of this waiver, or modification thereof, might be effected and that if desired by the estate an opportunity would be afforded for another informal conference.

The "proposed settlement of the federal tax liability," recognized by executors' counsel, is evidenced by the contingent collateral agreement and by Form 890-B (Estate Tax Waiver of Restrictions). The footnote of the latter document reads:

> The execution and filing of this form will expedite the adjustment of the tax liability as indicated above. It is not, however, a final closing agreement under section 7121 of the Internal Revenue Code of 1954, and does not, therefore, preclude the assertion of a deficiency * * * should it subsequently be determined that additional tax is due * * *

Indeed Form 870-AD entitled "Offer of Waiver of Restrictions on Assessments and Collection of Deficiency in Tax and of Acceptance of Overassessment" (and similarly Form 890-B) cannot qualify as a closing agreement as authorized by 26 U.S.C. § 7121 (1964), nor as a compromise agreement as authorized by 26 U.S.C. § 7122 (1964). See *Uinta Livestock Corp. v. United States*, 355 F.2d 761

(10th Cir. 1966); *United States v. Prince*, 348 F.2d 746, at 749 (2d Cir. 1965). *Uinta, supra*, makes it clear that "at the present time Congress has specified how tax matters may be settled either by a closing agreement or by compromise."

Subsequent to the April 2, 1962 conference at which the executors were informed of the Government's rejection of the "proposed settlement," counsel for the executors, without avail, requested identification of the reasons for the rejection. By conference and correspondence these requests were directed to the Cleveland District Director's office, to the Cincinnati Regional Commissioner, and finally to the Commissioner of Internal Revenue. Typical of these efforts was counsel's letter to Commissioner Caplin on August 13, 1962:

> we were granted, an audience with Regional Commissioner Vaughn in Cincinnati.
>
> Alas, the only thing this conference produced was the statement of the Regional Commissioner (in his letter of June 29, 1962, page 2) that:
>
> > there are several things which lead me to believe that there is a clearly defined error in this case having a substantial effect on the tax liability.
>
> We begged the Regional Commissioner to identify these "things." (See our letter of July 26, 1962. to the Regional Commissioner.)
>
> No such specification has been forthcoming.

The reaction of the Internal Revenue Service is reported in the Commissioner's responding letter of October 5, 1962:

> As I understand your position, you are not raising the substantive issues in this case, but are focusing your criticisms on a procedural basis. You point out that in Rev. Proc. 60-24, it is noted:

> Occasionally, in cases where an agreement is reached at an informal conference, review of the case will disclose that the conferee's decision was based on a clearly defined error having a substantial effect on the tax liability.

As the procedure further points out:

> * * * In such instances, if the change necessary to correct the error is adverse to the taxpayer, he will be offered another informal conference in the matter with the Conference Coordinator. * * *

I also invite your attention to Regulations, Section 601.105(c) (3), on rules governing informal conferences. In the third and fourth sentences preceding the end of paragraph (3), it is pointed out that conference reports are subject to review, and that the purpose of review is to insure uniformity in the application of the Code, regulations, rulings, and general policy of the Service. That the live review function was shifted from the district office to the regional office does not change the effect and intent of the regulations. The portion of Rev. Proc. 60-24 referred to by you is a gloss on the regulations quoted above. The concept of not reversing a conferee's decision unless there is a "clearly defined error having a substantial effect on the tax liability" is intended to separate the insignificant from the significant, as well as those errors involving close questions of judgment. It is intended to permit correction of cases where errors are clearly identified—as compared to those which may be regarded as vague or uncertain. The concept is not a legal one as prevails in the standards of review in the Federal courts.

I do not think it advisable for me to express any views on the correct determination to be reached in this case. Rather, this must be left to the normal administrative and, if necessary, judicial processes. But I do believe that it was reasonable for the review staff to find, in your case, there was involved "a clearly

> defined error having a substantial effect on the tax liability." The legal presumption in favor of the Government, as provided by Section 2035 of the Code, was not adequately considered by the conferee, particularly in the light of the evidence indicating testamentary motive.

The Government's authority to settle a claim of tax liability depends upon and is limited by 26 U.S.C. § 7121 (1964), entitled "Closing Agreements" or by 26 U.S.C. § 7122 (1964), entitled "Compromises." Under Section 7121

> The Secretary or his delegate is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

Section 7122 applies to litigation only. It provides that

> The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

These two sections, like the earlier Section 3229 of the Revised Statutes, 47 Stat. 1518, "prescribe the exclusive method by which tax cases could be compromised." *Botany Worsted Mills v. United States*, 278 U.S. 282 (1928). Followed in *Joyce v. Gentsch*, 141 F.2d 891, at 895 (6th Cir. 1944).

The plaintiffs do not claim that either the "Secretary or his delegate" expressly approved the Informal Conference Agreement. On the contrary, the Commissioner of Internal Revenue, deemed to be a delegate of the Secretary, affirmed the rejection of the proposed informal

conference agreement, as is revealed in the Commissioner's letter. Plaintiffs appear to argue that subject to the Government's right on review to revoke the informal conference agreement upon a finding of "clearly defined error," Treasury regulations and procedures have delegated to the Conferee at the Informal Conference, the Secretary's authority to bind the Government to an informal conference agreement.

Thus plaintiffs urge:

> The Government is bound by the Informal Conference settlement because the Government has not made, or notified the taxpayer of, any finding of "clearly defined error" for which alone the Government reserved the right to revoke the Informal Conference agreement.

In developing their argument, plaintiffs make this comment on Rev. Proc. 60-24 (5) (.04), *supra*, promulgated by the Commissioner (in 1960 the term "clearly defined error" first appears in the revenue procedures):

> The Commissioner has not said that an agreement reached at Informal Conference will be reopened:
>
> for error,
>
> nor has the Commissioner said that such agreement will be revoked if the reviewer:
>
> comes to a different conclusion on the weight of the evidence.
>
> The standard to be applied, according to the Commissioner's commitment to taxpayers, is the standard of:
>
> clearly defined error.

Before looking at Rev. Proc. 60-24(5) (.04) on which plaintiffs' argument relies, it is essential to study the Rules Governing Informal Conferences, 26 C. F. R. § 601.105(c) (3), into which Rev. Proc. 60-24(5) (.04) was incor-

porated (28 Fed. Reg. 2944, March 26, 1963). These Rules instruct the Conference Coordinator or Conferee

> to provide the taxpayer a fair and courteous hearing at which time taxpayer may present his statement of facts and his view of the issues; to make certain that all pertinent facts are included in the record and are considered in arriving at the proposed recommendation and that the proposed recommendation is in accord with the interpretations of the Internal Revenue Service as expressed in regulations and rulings * * *

Executors' counsel's letter indicates that the Informal Conference held by the examining officer and the Conferee was "a fair and courteous hearing," which conformed to these Rules.

> Estate representatives presented a written statement setting forth the basis of the claim that the gifts were not made in contemplation of death. Oral arguments were made by both sides. Thorough questioning was conducted by both * * * Conferee and * * * Examining Officer.

Neither as held, nor as intended, is the Informal Conference an adversary proceeding to which witnesses may be subpenaed, or at which witnesses are placed under oath, or subjected to examination and cross-examination. As anticipated by the procedure Rules, the Conferee functions as an interrogator and negotiator, not as an adjudicator. The Informal Conference reached a proposed settlement concerning the claim that the gifts were not made in contemplation of death. Yet this question could not be and was not adjudicated.

Rev. Proc. 60-24(5)(.04), 1960-2 *Cum. Bull.* 60-24 (5)(.04) contains the following language upon which plaintiffs build their position:

> Occasionally in cases where an agreement is reached at an informal conference, review of the case will dis-

close that the conferee's decision was based on a clearly defined error having a substantial effect on the tax liability.

The words "review of the case," "conferee's decision," "based on a clearly defined error" are suggestive of judicial review. Use of this terminology lends plausibility to counsel's argument that "the Government reserved the right to revoke the informal conference agreement only upon a finding of 'clearly defined error.'" Since Rev. Proc. 60-24(5)(.04), is incorporated into the Rules Governing Informal Conferences, it must be interpreted within the context of the Rules. As seen, the informal conference agreement is a "proposed recommendation." The Informal Conference agreement is not an adjudicated decision, and is therefore not judicially reviewable. Rev. Proc. 60-24(5)(.04), itself, recognizes that "review of the case" does not contemplate a judicial review. The only recourse provided "if the change necessary to correct the error is adverse to the taxpayer" is to offer the taxpayer "another informal conference." Thus the departmental "review of the case" serves as a part of, and a check upon, the operation of the informal conference procedure.

The Rules instruct the Conferee "to explain fully to the taxpayer the conclusion reached and the reasons therefor." Significantly, there is no similar provision upon review. "If the change necessary to correct the error is adverse to the taxpayer," Rev. Proc. 60-24(5)(.04) does not direct the reviewing officer to explain to the taxpayer the conclusion reached or the reasons therefor.

All arguments considered, it must be and is found and determined that Rev. Proc. 60-24(5)(.04), construed as a part of the Rules Governing Informal Conferences, does not delegate to the Informal Conference Conferee the authority vested in "the Secretary or his delegate" to bind

the Government to a settlement of a tax liability. Moreover, it is not possible to imply a delegation of the Secretary's power to enter a closing or compromise agreement. "The United States cannot be bound * * * in the absence of statutory authority to enter into the contract which is sought to be implied by operation of law. [Citing cases]" *United States v. Saladoff*, 233 F. Supp. 255, at 259 (E. D. Pa. 1964).

The Internal Revenue Service, by its revenue procedure, is not required to identify to the taxpayer the error upon which an Informal Conference agreement is rejected. Nevertheless such disclosure by the district or regional office would certainly foster needed understanding and confidence between the taxpayer and the tax-gatherer. By this means a further informal conference would be encouraged and resolution of the dispute without litigation might result. The understandable exasperation of the taxpayer and its counsel in repeatedly being rebuffed as they sought identification of the claimed "clearly defined error" is a perfect case in point.

Certainly it stopped short of clarifying the "clearly defined error" for the Cleveland office to say, later substantially repeated by the Commissioner in his letter,

> The "clearly defined error" in this case is the failure to give proper application to the legal presumption in favor of the Government, as provided by Section 2035 of the Internal Revenue Code, in view of the evidence indicating testamentary motives.

Plaintiffs also contend that since the Commissioner has failed "to abide by the Treasury regulations and published procedures, the assessment and collection is erroneous and illegal."

The Introduction to the *Internal Revenue Bulletin* specifies that "Revenue Rulings and Revenue Procedures

reported in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose." Hence, Rev. Proc. 60-24(5)(.04), 1960 *Cum. Bull.* 60-24, upon which plaintiffs rely, has neither the force nor effect of a Treasury Department regulation, nor of law.

Rev. Proc. 60-24(5)(.04) was incorporated into the Code of Federal Regulations, 26 C. F. R. Sec. 601.101, Statement of Procedural Rules on March 26, 1963, as an amendment to 26 C. F. R. Sec. 601.105(c)(3), Rules Governing Informal Conferences (28 Fed. Reg. 2944 (1963)), and was repealed, 31 Fed. Reg. 2818, Feb. 16, 1966. Publication of Rev. Proc. 60-24(5)(.04) as a regulation on March 26, 1963 should not retroactively affect the instant Informal Conference agreement of November 28, 1961 nor the review of this matter during 1962.

Furthermore, the Statement of Procedural Rules are promulgated under Revised Stat. 161; Title 5 U. S. C. § 22 (see Authority at page 4, 26 C. F. R. Sec. 601.101). This enabling statute requires, that regulations prescribed by the head of the department be "not inconsistent with law." 26 C. F. R. Sec. 601.105(c)(3) does not expressly delegate, and it cannot impliedly delegate, to the Informal Conference Conferee the authority to bind the Government to a settlement of a tax liability. To imply such a delegation of power would contravene Internal Revenue Code of 1954, §§ 7121, 7122, 26 U. S. C. §§ 7121 and 7122 (1964), which vest only in "the Secretary or his delegate" the power to enter a closing or compromise tax liability agreement.

In result, this court's conclusions concur with the determination of *Luhring v. Glotzbach*, 304 F.2d 560, at 564 (4th Cir. 1962), that the Statement of Procedural Rules do not have the effect of law and are directory in character.

Keinemar v. United States, 301 F.2d 267 (7th Cir. 1962), relied upon by plaintiffs, is explained and distinguished in *Geurkink v. United States*, 354 F.2d 629 (7th Cir. 1966). In appearing to approve *Luhring's* characterization of the procedural rules as directory, *Guerkink* significantly quotes from *Luhring*, "We do not understand that we have held to the contrary."

For the foregoing reasons it is found and determined that Count II, when tested against material facts concerning which there is no genuine issue, does not constitute a legally sufficient ground of recovery.

Count III, adopting many of the paragraphs of Count II, asserts that the additional tax and interest, "was determined, assessed and collected from plaintiffs in violation of the Administrative Procedure Act, 5 U. S. C. Section 1001 et seq., and is void. * * *" The conclusion reached with reference to Count II requires the further determination that neither the Informal Conference nor the review of the Informal Conference agreement is subject to the provisions of the Administrative Procedure Act. In addition, it is specifically found and determined that 5 U. S. C. § 1004, par. 1 (1964), which excepts matters subject to trials de novo from the adjudication procedure set forth in that section, exempts and excludes the Informal Conference procedures from the operation and effect of the Administrative Procedure Act. Hence, neither the Commissioner nor his subordinates who reviewed the Informal Conference agreement was required by 5 U. S. C. § 1005 (d) (1964), in rejecting the "proposed recommendation," to accompany their action with a simple statement of procedural or other grounds."

Count III presents no genuine issue of material fact and no legally sufficient ground of recovery.

Count IV asserts that

> the United States has retained the benefit of the agreement made at the Informal Conference and is estopped to repudiate that agreement or to claim that the sums paid by the executors pursuant to the agreement reached at the Informal Conference did not fully and completely discharge all of the balance of any federal estate tax and interest thereon rightly due from the estate of the decedent.

Upon the reasoning already expressed, and upon the authority of *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1916), it is generally determined that the United States cannot be estopped to repudiate the Informal Conference agreement. *Utah Power*, in part holds,

> The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *Id.* at 390 (syl.).

The estoppel count will be studied in more particularity.

In claiming that the United States has retained the benefit of the Informal Conference agreement the plaintiffs refer in part to the collateral agreement which was executed by the executors contemporaneously with Form 890-B. The collateral agreement is by its express terms dependent upon a contingency. The agreement of the executors was that

> in the event of the acceptance by or on behalf of the Commissioner of Internal Revenue of a proposed settlement of the estate tax liability of the Estate of Helen Wade Greene.* * *

The proposed settlement was not accepted, and did not become binding under 26 U.S.C. § 7121 or § 7122 (1964). With the collateral agreement ineffective, the "cost bases

for income tax purposes" of the shares of stock identified in the collateral agreement never became obligatory. The executors are free to ignore the collateral agreement's proposed "cost bases for income tax purposes."

The record indicates that none of the Form 890-B agreed tax deficiency of $77,781.53 plus interest of $8,307.71 was assessed upon the basis that Helen Wade Greene on August 15, 1957 transferred her property to the newly created trust in contemplation of death. On the contrary, as executors' counsel stated in their letter of April 3, 1962

> this deficiency was based upon a determination that the gift made for the benefit of the decedent's daughter referred to above was not made in contemplation of death.* * *

Hence it is concluded that any claim of estoppel, in any event, should be limited to the Form 890-B aggregate deficiency of $86,089.24. The payment of that sum on January 3, 1962, none of which is attributable to the additional tax later assessed, may not be asserted as proof of the claim of estoppel now made to support recovery of the additional tax payment.

Should the plaintiffs hereafter seek recovery of the $86,089.24, at that time consideration can be given to the effect upon any claim of estoppel because of the taxpayer's payment of $86,089.24 on January 3, 1962 prior to the Government's assessment of this amount on January 19, 1962. Consideration can also then be given to the question of whether a claim of estoppel, if established, can be raised by the taxpayer against any attempt by the Government to assert, defensively, any applicable period of limitation. Count IV, measured against the material facts on which there is no genuine issue, is not legally sufficient.

The Government's motion for summary judgment is granted as to Counts II, III, and IV. As to plaintiffs' motion for production of documents, whatever those documents may disclose can have no bearing on the legal sufficiency of Counts II, III, or IV. The determinations heretofore reached render immaterial and moot both the adequacy and the accuracy of whatever reasons motivated rejection, on review, of the "proposed recommendation" accomplished at the Informal Conference. Accordingly, plaintiffs' motion is denied.

OPINION OF JUDGE THOMAS GRANTING INTERLOCUTORY APPEAL OF SUMMARY JUDGMENT ON COUNTS II, III AND IV.

United States District Court for the Northern District of Ohio Eastern Division.

December 20, 1966.

THOMAS, *J.*

This Court has granted defendant-Government's motion for summary judgment on Counts 2, 3, and 4 of plaintiffs' complaint, Count one, seeking a tax refund "on the merits," was not involved in the motion of the defendant. Plaintiffs now move for allowance of an interlocutory appeal under Title 28 U.S.C. § 1792 (b) (1964).

In the oral argument on the motion for summary judgment plaintiffs' counsel insisted that they are entitled to a jury trial on Counts 2, 3, and 4. Should the plaintiffs not prevail on an interlocutory appeal, on remand a single jury trial would then proceed on Count one alone. However, should the plaintiffs on interlocutory appeal succeed in reversing this Court's ruling, presumably plaintiffs thereby would become entitled to a jury trial on the issues presented by all four counts of the complaint. In

such event, a single jury trial on all four counts could then proceed.

Were this Court to disallow plaintiff's motion for an interlocutory appeal, a jury trial would proceed on Count one. Thereafter, should the plaintiffs on appeal secure a reversal of this Court's order granting summary judgments, on remand, a second and separate jury trial on Counts 2, 3, and 4 presumably might become necessary.

One jury trial to resolve all issues of fact either on Count one alone or on all four counts is advisable. Permitting the interlocutory appeal "may materially advance the ultimate termination of the litigation * * *." 28 U.S.C. § 1292 (b) (1964). There are also novel and controlling questions of law for which there is substantial ground for difference of opinion.

Therefore, it is determined that there is full justification for an immediate appeal from this Court's order granting summary judgments against the plaintiffs on Counts 2, 3, and 4.

Plaintiffs' motion for interlocutory appeal is granted.

ORDER OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING INTERLOCUTORY APPEAL.

January 11, 1967.

Before O'Sullivan, Edwards and Celebrezze, Circuit Judges.

Upon due consideration thereof,

IT IS ORDERED that the motion of the above named plaintiff-appellants to take an interlocutory appeal pursuant to the provisions of 28 USC § 1292 (b), may be, and it is, hereby denied.

OPINION OF JUDGE CONNELL GRANTING TAXPAYER'S MOTION FOR DIRECTED VERDICT.

United States District Court for the Northern District of Ohio Eastern Division.

April 18, 1968.

Reported in 68-1 USTC ¶ 12,532.

CONNELL, J.

First of all we thank counsel for their courtesies, and their expeditious, competent presentation of the claims of each respective side.

Plaintiffs here seek recovery of Federal Estate Tax in sum of $565,980.20, plus interest and certain adjustments which may be appropriate.

The Collector of Internal Revenue collected this tax on the theory that a gift in trust made by decedent on August 15, 1967, was made by decedent in contemplation of her death, which was sudden and unexpected on Christmas Day, December 25, 1958, some sixteen months after gift in trust.

The evidence is that changes in the laws required the making of changes in the affairs of this decedent, and on the occasion of her taking care of these other affairs, decedent made this particular gift.

The family history with which we are here concerned is most unique. Their wealth came primarily through an ancestor who built the first telegraph system across the western half of our dear country, which ultimately became the Western Union Telegraph System.

The family had an extraordinary history of originating, nurturing, and supporting many of Cleveland's charitable and philanthropic institutions. The Government called these to the Court's attention on jury impanelment, so that we could ascertain if prospective jurors were con-

nected with approximately one dozen such enterprises with which this family was greatly concerned.

The evidence is that the family gave Wade Park to Cleveland, originated our art museum, contributed their paintings to such, and made it one of the world's finest. That is rather universally acknowledged.

In large part the family had much to do with creating and supporting something like a dozen enterprises on a similar scale.

Decedent, Helen Wade Greene, maintained her interest in these dozen civic enterprises, all her life, and she developed and encouraged her daughter's interest in the same, and made gifts to them all consistently over a period of many decades, and in comparatively large amounts.

On her instant gift to her daughter, with which we are here concerned she first paid a gift tax to the defendant of some three hundred thousand dollars. The gift to her daughter was one of the income only on such one million dollars, and the remainder was to go, on her death, to the daughter's two sons. And should they precede their mother in death, which God forbid, then on such mother's death, it was all to go to charities. Thus, all that the daughter of Helen Wade Greene was ever to get would have been the income from the estate, which eventuated in the annual approximate income of $43,000, subject to income tax, but this money was not to be used by the daughter for her own purposes in any way at all. It was to be utilized by her to carry on the approximate dozen charities originated and nurtured by the family through the years; and the daughter was to use it to continue to make payments for such which had previously been made by the mother. So all the daughter was ever to personally derive from the gift, which is the subject at issue, was really to consist in the pleasure of handling or continuing

to handle money by making the payments which had previously been made by her mother at the behest of the daughter.

The daughter was her only child. This daughter's two sons were her only grandchildren.

There was testimony on the intention of decedent on this subject from Dean Perry, decedent's son-in-law, to the effect that on a particular occasion when there was a family discussion as to a contribution by the mother to our local Children's Aid Society, which is in Cleveland, at which time the decedent had said, in the spring of 1957, "Why don't I give Helen the money and she'll take care of it herself and it wouldn't then be necessary to come to her each time?"

The enterprises in which they were interested required some help. It is a sort of question she put to the husband to which he testified.

Nothing was said as to how she would go about accomplishing such result. And it is evident throughout the case that this good woman on many occasions did things, did many things, many fine things, and rarely had much to say. So the husband did not know how she was to go about this until later they ascertained, some time in August, this gift in trust had been made.

He then learned that she had suggested that this particular gift be handled through the Union Commerce Bank, her monies theretofor being with the Cleveland Trust, and that she had made that suggestion not because he was to profit by it in any way, but she thought that since he was a director at Union Commerce that that might, in a sort of psychological way, be of some little benefit to him. In other words, the people with whom he was surrounded could be saying at the bank that we have a million dollar trust fund here today and it came about through our director's mother-in-law's benefaction.

The evidence here is that the so-called gift to the daughter merely saved the mother the inconvenience of making many separate charitable contributions through the daughter which she had been making through the years, as her daughter had reported the needs of each of these various and many institutions. And it put on the daughter the task thereafter of administering such funds' income directly, as she saw fit, meaning as she saw the need to pay the upkeep of these various institutions for which upkeep for many years her mother had paid through the daughter herself on previous occasions.

The record indicates the daughter had contributed to many charities herself, as is evidenced by one of the exhibits in the case, which shows that her average charitable beneficiences had equalled the approximate sum of $23,000 per year the preceding 5 years before the event with which we are here concerned, but that during the succeeding five years after 1958, her payments to charities increased in quite exact proportion to her increased income from this gift.

The "beneficiary" of this million dollar gift in trust, Mrs. Dean Perry, daughter of Helen Wade Greene, who was here a witness, testified to her family history, her benefactions, how the family had developed her interest in their philanthropic endeavors over the years. Their interest in Beech Brook Protestant Orphan Asylum went back to a situation in the 1850s when so many children were orphaned in Cleveland by a cholera epidemic. She related how charities and their maintenance had become an avocation of hers. The orphan asylum we mentioned now handles retarded children, because as we all know there are no orphans. Most orphan asylums are now peopled by little folk whose parents have disagreed, but there are practically no orphans around. And retarded children

have been neglected for decades and are now finally getting some help.

Her family is now paying for two thirds of the cost of the operating room for the children's hospital wing, I think it is, of the new Medical Center Building out here at University Hospitals. She described her mother and her activities. She described how her mother told her in the spring of 1957, at the time the husband mentioned this conversation, that she, the mother, was going to give her a million dollars so she could make her own contributions, and so that she wouldn't have to come to the mother each time she needed a large contribution for some one of these groups.

She testified that she later learned how this had been accomplished, and, of course, as soon as this gift in trust was made to her, and additional income followed, she immediately paid out that income in amounts here in written evidence in one of these exhibits, both during the intervening time before her mother died sixteen months thereafter, and ever since to this day.

When the lawyers called on the mother to change these other documents in August of '57, in order to conform to changes which had been made in the laws, this gift in trust was then made by her. In other words, she had talked about it in the spring, but did it only on the occasion of her meeting with the lawyers to have done something else. This simplified matters for the mother. The daughter had well learned how to make these decisions under her mother's tutelage, so that matters were thus simplified for the charitable institutions involved, and for the mother, who is now turning this responsibility over to the daughter, including the money it would take, having been the same money she had been using, and the daughter had and has the pleasure of continuing to foster the

family plan, but that is all she gets out of it, although, as some one counsel said, she could put it all in her pocket if she wanted to. So we know we are dealing with very honest people here.

Many witnesses testified to the cheerfulness and the activities and the never-ending kindness of Helen Wade Greene.

At her sudden and unexpected death on Christmas Day of 1958, her bags were packed preparatory for a two months trip to Florida to begin two or three days later. When she became a little distressed on this sad occasion, she was greatly concerned over the presents to be given to the maids who worked for her. When told she had to go to the hospital, she wanted the faithful old driver to take her. She had felt a little obligation towards a practical nurse who looked after her husband during his long illness. Some of our work here consists of reading people's minds. This lawsuit is one in which the Government seeks to read people's minds through a presumption that the lawyers have talked about.

This good lady didn't quite know what to do for this nurse until one day she saw the nurse's five year old little boy. When she saw the five year old boy, she figured out what to do. She said nothing. Some days later she called this lady into her room and handed her an envelope saying nothing about it, and when the lady looked at the envelope later on, she found it contained a five thousand dollar check.

Just what was in this lady's mind? Well, she knows that everybody in her family gets good educations, which had something to do with welding the country together when it was very much in need. West of the Mississippi was largely under control of the Indians in the 1840s and 1850s. Someone figured out a way to get a message from

St. Louis to Sacramento and San Francisco by pushing a little button, and that meant that we now were a complete country. We no longer had to send mail around Tiera del Fuego, which is the southern tip of South America; we didn't have to send messages on ships around South America to get information back and forth from our west coast; the telegraph opened the way for the whole country. It was our great safeguard during the Civil War. This lady knew that people with money get all the education that they can swallow, if they are willing to try.

So this good lady knew that everybody around her was educated; she had a fine son-in-law who had been to two schools at Harvard, and she hoped her grandsons would go there. She looked at this poor little fellow and said to herself, "I know what to do." Just like she said to her daughter, "You take care of this." She doesn't say so on paper, and she didn't say anything on paper with the five thousand dollar check.

And since we are all mind readers to a degree, it isn't hard for us all to conclude, and it is no important part of the lawsuit, but it is worthy of mention, because in a courtroom it was a most unusual thing to hear, we all know that what she did, without saying two words about it, was to provide for that boy's education without putting anything on paper which would have compelled the parents to give it to the boy. That mother, that lady, made that effort to help a little boy who warmed her heart, although she had laid eyes on him but once.

We must hold, from all the evidence we have had in this case, that this gift was not made in contemplation of death, and that any such presumption which the law has here created to the effect that it was made in contemplation of death has been here completely dispelled and destroyed by the evidence which has been before us.

The presumption has been the Government's only real defense to this action, so we have here a case in which when the presumption has been overcome and destroyed, no defense remains.

If this daughter had put the million in her pocket, I don't know who could have complained. There is nothing on paper compelling her to make these payments. That is the way the mother operated, just as she did with the five thousand dollar check, which was a pretty good key to how the mother's mind worked.

This mother left this million to create a fund to help all these benefactions and to continue the help they were getting, over which she had some control through the life of the daughter. Then it went to the boys, and she doesn't say in writing what the boys are to do with it, anymore than she said in writing what the mother was to do with it. I think she hoped, we are mind reading again, I think she hoped that the mother would train the sons to take the same interest in these charities which the grandmother had and which the mother has. And she did it without saying a word about it or writing a word about it, just like she wrote no orders for the daughter, knowing that her wish will have been meticulously carried out throughout the daughter's life.

There is a complete lack of any evidence here on the part of the Government to show that this was ever a gift in contemplation of death. And by contemplation of death we mean the impelling cause of this gift. There is no evidence here upholding the Government's theory that the impelling cause of this gift was the thought of death. There is no such evidence anywhere in this case. There is nothing before us to that effect anywhere. There was only a rebuttable presumption, which was completely rebutted.

So I feel that if I submitted this case to a jury which found for this defendant that I'd be compelled by law and conscience to set such a verdict aside. So this afternoon, when the jury gets back here, we will instruct them to bring in a directed verdict to that effect, and I will be glad if all counsel will meet with me, let's say a quarter to two, to provide for the wording. Will you gentlemen do that?

Mr. KOYKKA: Yes, your Honor.

Mr. ARKIN: Yes, your Honor.

The COURT: We will take an adjournment at this time for courtroom purposes until 2:00 o'clock this afternoon.

OPINION OF JUDGE CONNELL INSTRUCTING JURY TO RETURN VERDICT FOR TAXPAYER.

United States District Court for the Northern District of Ohio, Eastern Division.

April 18, 1968.

Reported in 68-1 USTC ¶ 12.532.

CONNELL, *J.*

Ladies and gentlemen of the jury, we now must tell you what has happened in your absence.

As you know, yesterday we finished all the evidence in the case. Mr. Koykka on the plaintiff's side was going to make a motion for what in law is called a directed verdict, but we told him to hold it until today. This morning he argued his motion, and Mr. Arkin argued against it on behalf of the Government, the Government being the defendant in this action.

I have ruled in favor of Mr. Koykka, meaning I have ruled that plaintiffs here, meaning really the family of Helen Wade Greene, have a right to have us require that

the money which they had to put up, which was near a half million dollars, when the Government claimed that this gift was in contemplation of death, be returned to them. In other words, they had to put up a half million dollars to protect their rights, and they have sued now for the return of that money with interest, which they have a right to do.

Here is the way I figured it out, that being my responsibility before it is passed to you, if, as and when it is passed to you, which in this case it will not be.

We had a situation here where Helen Wade Greene, who is the mother of a daughter who has been in the courtroom throughout the case, and which daughter you heard testify, we have a situation where she wanted to give her daughter a certain amount of money so that the daughter could directly take care of the gifts which had to be constantly made to the dozen or so beneficiaries which they have been helping, really, for generations in this town.

When a person makes any kind of a gift of that character, and doesn't live for three years thereafter, there is a legal presumption, which was enacted by Congress and which became a law of the United States, to the effect that if you don't survive your gift by three years, then it is presumed that it was made in contemplation of death. Just a presumption. In other words, you go home tonight and you decide to give a child a great big gift, if you had the capacity to do so, and then you died next month or two years after, or two years and 11 months and 29 days after, if you died within the three year period, there is a presumption that you did it to evade taxation on that money. That is the law of the country.

Now this lady, anxious to have her daughter look after these charities, and having taught her how—and I

suppose she was very happy that the daughter did so well at doing what she used to do—she decided that instead of having the daughter run to her every time she needed money for any one of these dozen enterprises, that they were engaged in or had originated, in some cases, she decided, instead of the daughter running to her every time she needed some money for some one of these projects, to give her a million dollars—she had nine million, you know—give her a million dollars, and then let the daughter take the income from that money, to put up the money to help these various enterprises which the mother herself had been helping.

In other words, this lady testified in the courtroom, she is 57 years old, this all happened in '57, this is '68, so it is 11 years ago, so she was 46 years old at the time when the mother said, "Here's a million. You pay these bills as you see fit, and then you will not have to come to me to ask me for the money every time you need it." Then she dies in sixteen months, and Uncle Sam steps in and says, "Well, she died within the sixteen months, so there is a presumption that it was done to avoid a tax on the same money which she might have still been holding when she died at some later time."

Now, what you have to do when Uncle Sam says that to you, you have to produce a sum of money equivalent to the money they claim. So she had to come up somehow with nearly a half million dollars and say, "Here it is." But the law says ultimately if they shouldn't have taken it in the first place, they have to pay her six per cent interest for taking it at all. And that is what I have held here.

I am telling you that because ultimately here we have to have your foreman, who is always the man in the closest chair to the Court, sign the verdict at our direction, and so we tell you what it is.

We have held that when the husband and the wife come in and testify to you that the mother had this conversation, and she said, "I am going to give you enough so that you can take care of this yourself, so you will not have to come to me,"—that conversation,if you remember, took place in the spring of '57, no one ever said she couldn't do anything about it for some length of time, but the day came when through changes in the laws the lawyers handling the estate for both the mother and the father called them in to say we have to make changes in your wills, because the laws require it.

Now as an incident to her discussion, she at that time said to them, "I want to give my daughter a million dollars for this purpose." And then they made the arrangements whereby that was done.

So we have the testimony of the husband, this gentleman who was an aviator for some five years in World War II, Mr. Perry, his testimony that that is what the mother said. The wife's testimony was also that that is what she said. You have the evidence that the money was actually given to her. Then there is in evidence here certain papers which go on to show that though she took this million in and started to get $43,000 a year income on it, which is a little over 4%, as you would recognize, the evidence then is that from that day on she took this $43,000 a year that she got from this million dollars, less whatever tax she had to pay by way of income—the records show that she had paid into charities herself, the younger woman now, $23,000 a year on an average for the five years preceding 1957, but that from '58 on she paid $43,000 a year more than the twenty she paid in the first place, so for the average of the five years after '58 she was paying, instead of the $20,000 a year which she paid the first five years, she was averaging $63,000 a year. So it looks like she paid the tax

on the 43 and paid the 43 in charities, too, and that she had done that for the five years succeeding 1958, and had done it ever since.

So to me that is proof that she was carrying out the mother's wish, and it is legal proof which sets aside and wipes out the presumption that the older woman who died had done this with any thought in mind of evading any taxation. So the only defense the Government had was this presumption which failed. So I have to hold that there was no defense. The minute the presumption fails, the minute they prove what was in the mind of the mother, from what she said and from what she did and from what they did to carry out the mother's wishes, then they proved the presumption has no substance or basis in fact.

So we get down to the proposition, and we so direct you, we direct you to file this verdict with us. I will read it to you, and then do a little more explaining. I better tell you how it is worded.

"District Court of the United States, Northern District of Ohio, Eastern Division." Well, Ohio in the Federal Court system is divided into Northern Ohio and Southern Ohio. We have 40 counties, and Southern Ohio has 48. There are 88 counties in Ohio. Eastern Division is the northern quarter of Ohio. We go down to a line directly north of Columbus and run from Pennsylvania to Indiana. And in the eastern division, where you are now, a part, 19 counties come under us, and Toledo has the other 21, which makes the 40 for Northern Ohio. I am explaining this so the language doesn't trouble you. So I will repeat.

"District Court of the United States, Northern District of Ohio, Eastern Division." The name of the case is "Cleveland Trust Company" which as trustees of the money of these people became a party to the case, "Cleveland Trust Company and A. Dean Perry, Executors of the

estate of Helen Wade Greene"—that means that Mr. Perry is one of the executors of his mother-in-law's estate, and Cleveland Trust Company is also, so I will repeat that—"Cleveland Trust Company and A. Dean Perry, executors of the estate of Helen Wade Greene, Plaintiff, against United States of America, Defendant. Verdict. No. C 64-359."

Then it reads as follows: "We the jury, by direction of the Court, on the issue joined, find that the gift of August 15, 1957 was not made in contemplation of death."

Now, what that means is that we are holding, and you are finding, at our direction, which you, of course, are required to do, that this money paid by this mother to this daughter at the time in question was not given to the daughter because the mother was contemplating death, or had it in her thoughts at all. It was a gift, I have described it completely, but you will remember this and it is worth repetition, wherein the daughter got the use of the money while the daughter lived, whatever length of time that would be. After the daughter died, it was to go to the grandsons. But if the grandsons died before the mother died, then the entire amount goes to charity in the same enterprises we have been talking about.

So at this time I must direct your foreman here, Mr. Walter J. Boerwinkle—and as I say, it has always been tradition that you pick the closest juror to the Court, the one in the closest corner of the jury box—we direct you, please, to sign this verdict, which we will read again. "We the jury, by direction of the Court, on the issue joined, find that the gift of August 15, 1957, was not made in contemplation of death."

Had we put the case to you, had we been required to, had there been any defense put up at all, that would have been the question you would have been called upon to de-

cide through a charge to the jury by myself. But as I say, there was no real defense here once the presumption had been dispelled by the evidence, and by the testimony, to the effect that that is what the grandmother wanted done.

(Juror No. 1 signing verdict.)

The Court: Now, we will ask you please to go to the jury room in back of this room, and just be seated for a few minutes until Mr. Thomas, our Clerk, can find out whether you will be needed any further today on any other jury. If not, then you will be excused, and we thank you for listening so patiently to all that has gone on.

(Following proceedings had out of hearing of the Court and jury:

Mr. Arkin: The Government reserves its exceptions to the Court's opinion and direction of the verdict to the jury.)

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISSENTING OPINION REVERSING JUDGMENT ON VERDICT DIRECTED FOR TAXPAYER.

January 23, 1970.

Reported in 421 F.2d 475.

Before: CELEBREZZE, PECK and MCCREE, Circuit Judges.

PECK, Circuit Judge. These combined appeals arose out of an action for the refund of federal estate tax deficiencies of $565,980.20, assessed and collected by the Internal Revenue Service against the Estate of Helen Wade Greene. The deficiencies were based on the determination of the Internal Revenue Service (hereinafter usually "IRS") that a transfer of property to an irrevocable trust by the decedent, Helen Wade Greene, some sixteen months prior to her death, was made in contemplation of death and thus includable in her gross estate.

The decedent, Helen Wade Greene, was a member of the wealthy and prominent Wade family of Cleveland, Ohio. On August 15, 1957, she transferred property having a value of $1,322,580.70 to an irrevocable trust which provided for payment of the income from the trust to the decedent's daughter, Helen Greene Perry, for life, with the remainder to be distributed to the decedent's grandchildren after Mrs. Perry's death. Approximately sixteen months after the transfer to the irrevocable trust, the decedent died.

The estate and the IRS initially attempted to use informal conference procedures to settle the dispute concerning whether the gift in trust was made in contemplation of death. For reasons more fully discussed below, the dispute was not thus settled at the administrative level; instead additional disputes outside the original contemplation of death issue arose out of the attempted settlement procedure. After that attempt disintegrated the estate paid the deficiency and filed a four-count suit for a refund. The last three counts, more fully discussed below, alleged that the estate was entitled to recover the deficiency independently of the merits of the contemplation of death issue because the IRS violated its own procedures in the course of the attempted settlement of the issue at the administrative level. The District Court granted the government's motion for summary judgment on the last three counts. The first count, concerning the merits of the contemplation of death issue, was tried to a jury. The first trial of the contemplation of death issue resulted in a mistrial when the jury failed to reach a verdict. In the second trial the District Court granted the estate's motion for a directed verdict at the close of all the evidence.

The government has perfected an appeal from the directed verdict in favor of the estate on the contemplation

of death issue. The estate has perfected an appeal from the District Court's orders granting the government's motions for summary judgment on the last three counts of the refund suit, the estate's motion for an interlocutory appeal from these orders having been denied by this Court. (Misc. No. 347, January 11, 1967.)

I. Contemplation of Death Issue.

We will deal first with the substantive issue of whether the transfer of property to the irrevocable trust on August 15, 1957, was in contemplation of death. Section 2035 of the Internal Revenue Code (26 U.S.C. § 2035) requires the inclusion in the gross estate of a decedent transfers made in contemplation of death, and creates a rebuttable presumption that transfers made within three years of a decedent's death were made in contemplation of death. Since the decedent died within three years of making the gift, the statutory presumption arose that the gift here was made in contemplation of death.

It should be noted at the outset that the government did not contend at trial that the decedent was fearful of imminent death at the time of making the gift. Therefore the gift was made in contemplation of death only if it was within the special statutory meaning of those words. Fortunately, the issue is not novel. The meaning of the words "in contemplation of death" as used in § 2035 and its predecessor statutes has long been settled by the case law.

A transfer may be "in contemplation of death" within the meaning of the statute even though not induced by a fear of imminent death. Death is "contemplated" within the meaning of the statutory presumption if the dominant motive for the transfer is the creation of a substitute for testamentary disposition designed to avoid the imposition of estate taxes. *Allen v. Trust Company of Georgia*, 326

U.S. 630 (1946); *United States v. Wells*, 283 U.S. 102 (1931); *In Re Kroger's Estate*, 145 F.2d 901 (6th Cir. 1944). Clearly, where the dominant motive for the transfer is to escape estate taxes, the gift is made in contemplation of death. *Cronin's Estate v. Commissioner*, 164 F.2d 561 (8th Cir. 1947). Finally, it is well established that when a transfer is part of an over-all testamentary plan, an intention to make the transfer a substitute for testamentary disposition and thereby avoid the imposition of estate taxes can be inferred. *Purvin v. Commissioner*, 96 F.2d 929 (7th Cir. 1938); *Updike v. Commissioner*, 88 F.2d 807 (8th Cir.), *cert. denied*, 301 U.S. 708 (1937).

Applying these well established principles to the evidence adduced at the second trial, we hold that the District Court committed reversible error in directing a verdict for the estate. The estate, which had the burden of proof (*McGrew's Estate v. Commissioner*, 135 F.2d 158 (6th Cir. 1943)), introduced evidence showing the Wade family's strong tradition of support of philanthropic and charitable organizations. The estate also introduced evidence tending to show that the decedent made the transfer to the irrevocable trust to enable her daughter to carry on the family tradition of support for these organizations by putting the money at her ready disposal. The estate also showed that the transfer to the irrevocable trust was a relatively small percentage of the decedent's total estate.

The District Court apparently viewed this evidence as sufficient to overcome the statutory presumption in favor of the government, for in granting the estate's motion for a directed verdict the Court stated:

> "There is a complete lack of any evidence here on the part of the Government to show that this was ever a gift in contemplation of death. And by contemplation of death we mean the impelling cause of

> this gift. There is no evidence here upholding the Government's theory that the impelling cause of this gift was the thought of death. There is no such evidence anywhere in this case. There is nothing before us to that effect anywhere. There was only a rebuttable presumption, which was completely rebutted."

While we agree with the District Court that the estate introduced evidence from which the jury could reasonably infer that the gift was induced by life motives and that such evidence was sufficient to rebut the presumption in the government's favor, we disagree with the District Court's view that there was no evidence from which reasonable jurors could infer that the gift was made in contemplation of death. It is true that the government produced only two witnesses of its own (and their testimony related solely to the government's split gift theory discussed below), but it adduced evidence through cross-examination of the estate's witnesses. By this means, frequently the only one available to it in such situations, the government showed that the property with which the irrevocable trust was funded came from the corpus of a revocable trust of approximately nine million dollars, that the decedent revised the revocable trust and her will, which poured over almost all of her property to the revocable trust, simultaneously with the execution of the irrevocable trust in issue, and showed the similarity of the dispositive provisions of each instrument. The government also established through such cross-examination that the decedent had at least some familiarity with the tax laws, that the daughter did not need the trust income for her own support and that the decedent had previously established a separate $1.5 million charitable trust. The effect of all this evidence adduced by the government was to undermine the estate's theory that the gift was induced

by a desire to enable the daughter to carry on the family tradition of support for charitable causes and to establish facts from which a jury could find that the gift was induced by a desire to create a substitute for testamentary disposition, thereby avoiding the imposition of estate taxes.

In reaching this result we particularly stress the lack of direct evidence of the motivation for the gift. The decedent failed to state to her attorney or to state in the trust instrument itself the reason for the creation of the trust. On one occasion when the decedent's daughter had asked for some money for a charitable cause, the decedent stated "sort of in a laughing manner" that she should give some money to her daughter to enable her to take care of the charities on her own. We do not find this statement, made some three to four months prior to the establishment of the trust, conclusive of the dominant motive for the gift.

If we were here reviewing a finding of fact by the court or a jury verdict that life motives were the dominant motives for the gift, we would affirm that finding. *See e.g., Routzahn v. Brown*, 95 F.2d 766 (6th Cir. 1938); *Clark v. United States*, 209 F. Supp. 895 (D.C. Colo. 1962); *Black v. United States*, 68 F. Supp. 74 (N.D. Ohio 1946). Many of the facts now argued by the estate are relevant and sufficient under the cases to support a finding of fact that the gift was induced by life motives. However, in light of the lack of direct evidence of the motivation for the gift, the dominant motive had to be inferred from the basic facts, and while there was no dispute about the basic facts, conflicting inferences as to the dominant motive for the gift could be drawn from those facts. The resolution of those conflicting inferences should have been left to the jury. *See e.g., Baker v. Texas & Pacific Railway Co.*, 359 U.S. 227, 229 (1959); *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1944). We therefore hold that

the District Court committed reversible error in granting the estate's motion for a directed verdict.

II. Split Gift Theory.

We turn next to the government's split-gift theory. Part of the direct testimony proffered by the government consisted of the values based on actuarial computations of the life estate to the decedent's daughter and of the remainder to the grandchildren. On the basis of this evidence the government contends that there were actually two gifts, the life income to the daughter and the remainder to the grandchildren. The government argues that the motive for each gift must be examined and that the estate failed to introduce any evidence at all of the motivation for the gift of the remainder interest to the grandchildren other than "family reasons."

The government admits that this multimotive split-gift theory has been tested in only two previous cases and upheld in only one of them. In *Garrett's Estate v. Commissioner*, 180 F.2d 995 (2d Cir. 1950), the Court held that a trust consisting of life insurance policies and securities, with direction to use the income from the securities to pay the premiums on the life insurance, constituted separate gifts with separate motives. The Court stressed, however, the unambiguous intention to make two separate gifts, one of the income from the securities (less the amounts used to pay the life insurance premiums), the other the life insurance policies themselves. The Court also found it clear that the donor did not intend the beneficiaries of the trust to have any interest in the insurance policies until after his death. Thus the Court had no difficulty finding separate motives for the obviously separate gifts contained in the same trust agreement.

However, in a case more factually similar to the case at bar, *Studebaker v. United States*, 195 F. Supp. 841 (N.D. Ind. 1961), *modified*, 211 F. Supp. 263 (N.D. Ind. 1962), the Court refused to apply the split-gift theory to a gift in trust providing for a life income to the settlor's daughter-in-law with a remainder over to the settlor's grandchildren. We agree with the Court in *Studebaker*, *supra*; that it is "unrealistic" to apply the split-gift theory to the type of gift at issue here. It is not reasonable to assume that the decedent had one motive for the gift of the life income and another for the disposition of the corpus upon the termination of the life interest. We must conclude therefore that the decedent had only one, albeit ambiguous, motive for the entire gift in trust, and we hold that the District Court committed no error in refusing admission of the evidence proffered to support the split-gift theory.

III. Procedural Errors.

We turn next to the additional issues which arose as the result of the attempt to settle the contemplation of death issue at the administrative level. The estate contends that even if the District Court committed error in directing a verdict for it, the judgment below must be affirmed because the IRS failed to follow its own regulations and procedures in dealing with the case at the administrative level.

Upon the initial examination of the estate tax return the IRS determined that the transfer to the irrevocable trust was a gift in contemplation of death and that therefore the amount of that transfer was includable in the decedent's gross estate. However, following an informal conference, as provided for by Treasury Regulations, an informal conference agreement was reached between the IRS

and the estate. The agreement provided for certain concessions by both sides. The IRS agreed not to raise the contemplation of death issue in return for the estate's agreement to the increased valuation of some securities held by it and payment of additional estate tax and interest in the sum of $86,089.24. Pursuant to this agreement the estate executed a Form 890-B, Waiver of Restrictions on Assessment and Collection of Deficiency and Acceptance of Overassessment. The executors and the beneficiaries of the estate also executed a "collateral agreement" which established their cost basis for the securities held by the estate at the increased valuation. Finally, the executors paid the additional assessed tax and interest of $86,089.24.

Approximately three months thereafter, the IRS informed the estate that it had rejected the informal conference agreement. The IRS again asserted that the irrevocable trust was executed in contemplation of death and includable in the gross estate. There then followed a great deal of correspondence between the estate and various levels of the IRS, with the estate seeking an explanation of the "clearly defined error" in the informal conference agreement for which the IRS exercised its power to reject the agreement. The most enlightening response came from the Commissioner of Internal Revenue, who stated:

> "* * * I do believe that it was reasonable for the review staff to find that, in your case, there was involved 'a clearly defined error having a substantial effect on the tax liability.' The legal presumption in favor of the Government, as provided by Section 2035 of the Code, was not adequately considered by the conferee, particularly in the light of the evidence indicating testamentary motive."

The estate then paid the deficiency and filed this four-count suit for a refund. As previously indicated, the first

count concerned the substantive issue of whether the gift was made in contemplation of death. The last three counts alleged respectively that the estate was entitled to recover the deficiency paid regardless of the determination on the contemplation of death issue because the IRS violated its own Revenue Procedures by failing to identify the "clearly defined error" for which it rejected the informal conference agreement, because the IRS violated the Administrative Procedure Act by failing to give its reasons for rejecting the informal conference agreement, and because the IRS was estopped to deny the enforcibility of the informal conference agreement by its acceptance and retention of the additional tax and interest of $86,089.24. The District Court granted the government's motion for summary judgment on these last three counts prior to the trial on the contemplation of death issue, and the estate has perfected a cross-appeal.

We will deal with each of these issues separately: With respect to the first, the estate contends that the IRS was bound by its own procedures to limit its rejection of informal conference agreements to circumstances involving "clearly defined error." Rev. Proc. 60-24(5) (.04), 1960 *Cum. Bull.* 60-24. While recognizing that the informal conference agreement is not binding on the IRS by statute such as a closing agreement authorized by § 7121 of the Internal Revenue Code or a compromise agreement authorized by § 7122 of the Code (26 U.S.C. §§ 7121, 7122), the estate contends that the failure to identify the "clearly defined error" prevents the IRS from rejecting the agreement. In examining the estate's argument, we note first that there is no requirement in the Treasury Regulations establishing the informal conference procedures that the IRS must identify or explain the error upon which it rejects an informal conference agreement. The Regula-

tions, after providing for review of the informal conference agreements by regional commissioners, states:

> "In certain circumstances, such as where substantial errors are found or where there is evidence of fraud or collusion, the regional commissioner has authority to reopen the case." Treas. Reg. 601.105(i).

Thus the estate's argument must stand or fall on the Revenue Procedure which provides:

> "Occasionally, in cases where an agreement is reached at an informal conference, review of the case will disclose that the conferee's decision was *based on a clearly defined error* having a substantial effect on the tax liability. In such instances, if the change necessary to correct the error is adverse to the taxpayer, he will be offered another informal conference in the matter with the Conference Coordinator." Rev. Proc. 60-24 (5) (.04), 1960 *Cum. Bull.* 60-24. (Emphasis supplied.)

Without reaching the question of whether the responses by the IRS to the estate's requests for identification of the "clearly defined error" were in fact sufficient, we must hold that the IRS was not required by the Revenue Procedures to identify the error for which the informal conference agreement was rejected. It is clear that the above quoted Revenue Procedure is directory, not mandatory, and the IRS's alleged failure to sufficiently identify the error cannot affect its right to assert a deficiency against the estate. See *Gourkink v. United States*, 354 F.2d 629 (7th Cir. 1965); *Luhring v. Glotzbach*, 304 F.2d 560 (4th Cir. 1962). Whatever deficiencies there may have been in the identification of the "clearly defined error" for which the agreement was rejected, the IRS was not foreclosed from rejecting the agreement by its own Revenue Procedures.

We turn next to the estate's argument that the rejection of the informal conference agreement violated the Administrative Procedure Act, thereby entitling the estate to the return of the deficiency paid. The estate relies on that portion of the Administrative Procedure Act which requires:

> "Prompt notice * * * of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding * * *. [S]uch notice shall be accompanied by a simple statement of procedural or other grounds." 5 U.S.C. § 1005(d) (1964 ed.).

The estate contends that the consideration and rejection of the informal conference agreement was an "agency proceeding" for which the IRS was required to give a statement explaining the rejection. We again must disagree. Further examination of the Administrative Procedure Act makes it clear that the Act was not intended to apply to this type of case. The Act itself excepts from its application "any matter subject to a subsequent trial of the law and the facts de novo in any court." 5 U.S.C. § 1004 (1964 ed.). The rejection of the informal conference agreement was in fact a determination of the estate's tax liability, a matter subject to trial de novo in either the Tax Court or in the District Court. We therefore hold that the rejection of the informal conference agreement by the IRS did not violate the Administrative Procedure Act.

The final issue raised by the estate is that the IRS is estopped from rejection of the informal conference agreement after having accepted the benefits of the agreement, the "collateral agreement" whereby the estate and the beneficiaries agreed to a higher cost basis for certain securities held by the estate and the payment of $86,089.24 of additional estate tax and interest.

Without indulging in a protracted discussion of the

few cases in which equitable estoppel has been applied against the government in tax cases, we hold there is no sufficient factual basis for imposing estoppel against the government in this case. The "collateral agreement" referred to above was expressly stated to be contingent upon "* * * acceptance by or on behalf of the Commissioner of Internal Revenue of a proposed settlement of the estate tax liability of the Estate of Helen Wade Greene * * *." In addition to this specific recognition that the informal conference agreement was subject to rejection by the Commissioner of Internal Revenue, the estate was informed by the IRS at the time of the rejection of the informal conference agreement that it was no longer bound by the "collateral agreement" and that it was free to withdraw the "collateral agreement." The estate apparently did not choose to do so, but this decision not to withdraw the "collateral agreement" cannot now be made the basis for a claim of estoppel against the government. With respect to the estate's payment and the government's acceptance and subsequent assessment of the additional estate tax and interest in the amount of $86,098.24, we find the following statement by the District Court pertinent:

> "The record indicates that none of the Form 890-B agreed tax deficiency of $77,781.53 plus interest of $8,307.71 was assessed upon the basis that Helen Wade Greene on August 15, 1957 transferred her property to the newly created trust in contemplation of death. On the contrary, as executors' counsel stated in their letter of April 3, 1962
>
> > this deficiency was based upon a determination that the gift made for the benefit of the decedent's daughter referred to above was not made in contemplation of death * * *
>
> "Hence it is concluded that any claim of estoppel, in any event, should be limited to the Form 890-B aggregate deficiency of $86,089.24. The payment of that

sum on January 3, 1962, none of which is attributable to the additional tax later assessed, may not be asserted as proof of the claim of estoppel now made to support recovery of the additional tax payment."

We therefore hold that the District Court correctly ruled that there was no basis on which to find the government estopped to repudiate the informal conference agreement, and we hold that the District Court correctly granted the government's motion for summary judgment on each of the last three counts of the refund suit.

IV. Evidence of Post-Gift Health of the Decedent.

We will now deal briefly with the final issue presented in this appeal. The government contends that in the second trial of the contemplation of death issue, the District Court erroneously admitted into evidence, over the government's objection, evidence relating to the decedent's post-gift health and the sudden and unexpected nature of her death. The government concedes that the admission of the evidence would not be sufficient alone to warrant reversal of the directed verdict in favor of the estate, but it does assert that the evidence was irrelevant and highly prejudicial to it in light of the stipulation that the decedent was not fearful of imminent death at the time of making the gift and that the death was sudden and unexpected.

We agree that the admission of this evidence would not alone require a reversal of the directed verdict, but in light of the conflicting rulings on the admissibility of this evidence in the two jury trials and the probability of a third jury trial on the contemplation of death issue, we feel obligated to offer some guidelines.

In the trial of a contemplation of death issue the primary focus should be on the decedent's health and state of mind at and before the making of the gift to determine the

motive for the gift. See *United States v. Wells*, 283 U.S. 102 (1931); *English v. United States*, 270 F.2d 876 (7th Cir. 1959). Absent a contention by the government that the decedent was actually fearful of an imminent death at the time of the transfer, evidence of post-gift conditions such as the health, state of mind or sudden nature of the decedent's death would not be relevant. See *Cronin's Estate v. Commissioner*, 164 F.2d 561 (6th Cir. 1947). We therefore conclude that the admission of the evidence of the decedent's post-gift health and the sudden nature of her death was erroneous, and that in a subsequent trial of this issue such evidence should be excluded.

The judgment of the District Court in 19,175 granting the estate's motion for a directed verdict is reversed and the cause is remanded for a new trial consistent with the foregoing. The orders of the District Court in No. 19,176 from which the estate perfected an appeal are affirmed.

CELEBREZZE, Circuit Judge, dissenting. The majority reverses the District Court's finding that there was a "complete lack of any evidence" favorable to the Government. I disagree.

The estate of the deceased marshaled strong evidence as to the motivation for the contested gift. The estate demonstrated that the deceased wished to supplement her daughter's income to enable her to continue the Wade family tradition of good works, *United States v. Wells*, 283 U.S. 102, 118-19 (1931); that the deceased engaged in a lifetime pattern of giving to her daughters and grandchildren; *Routzahn v. Brown*, 95 F.2d 766 (6th Cir. 1938) *cert. denied* 290 U.S. 641; that the gift was but a small fraction of her taxable estate and hence unlikely that she was motivated by tax considerations, *Black v. United States*, 68 F. Supp. 74, 78, aff'd. 164 F.2d 96 (6th Cir. 1947); that at the time of the making of the gift the de-

ceased was in excellent health, *Hull's Estate v. Commissioner*, 325 F.2d 367, 368-70 (3d Cir. 1963); and that prior to the time of the gift the donee and her husband had solicited her mother's financial support in her charitable endeavors notwithstanding her own substantial funds. *Gamble v. Commissioner*, 33 B.T.A. 94, 95-97 (1935), *aff'd.* 101 F.2d 565 (6th Cir. 1939). No evidence was introduced to discredit this testimony.

The Government introduced no witnesses of its own to refute the compelling and credible evidence on behalf of the state. In that a verdict must be directed where there can be but one reasonable conclusion, the estate is entitled to a directed verdict unless the Government raises some evidence upon its own behalf. As the United States Supreme Court has instructed in *Brady v. Southern Rwy. Co.*, 320 U.S. 476, 480 (1943):

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Each of the inferences made by the Government are unwarranted "speculations" under the *Brady* standard:

The Government speculates as to what might have been the motive of the decedent with "some familiarity with federal tax laws" when she made the gift, notwithstanding specific unrebutted evidence of a lifetime pattern of giving and specific life motivations.

The Government further speculates as to what the decedent might have "said at the time of the execution" of the gift to her daughter, notwithstanding direct testi-

mony that the decedent had indicated her intentions to make the gift months earlier and spoke of it on three different occasions prior to its actual execution. At those times, prior to execution, the decedent indicated her desire to afford her daughter the funds which would aid her in further substantial charitable endeavors.

The Government also speculates as to the "simultaneous timing" of the formal execution of the will, revocable trust and challenged gifts. It does so notwithstanding unchallenged testimony that a re-execution of those instruments was necessitated at the time of the challenged gift, because Ohio law did not permit subsequent modifications to a pour-over trust. Ohio General Code § 10504-4, § 10504-47. *See, Bolles v. Toledo Trust Co.*, 144 O.S. 195, 210 (1944). In that both the will and the revocable trust required re-execution at the time of the gift, it was simply a matter of convenience to undertake all the formalities of execution and delivery at the same time.

Finally the Government speculates as to the "similarity in the dispositive pattern" of the aforementioned instruments. The record clearly shows that the effect of all the substantive changes in the instruments was to hasten the time and amounts of money to be received currently by the decedent's daughter. This effect is singularly in accord with the stated purpose of the challenged gift—to further stimulate and encourage the decedent's daughter toward a lifetime of charitable endeavors, as was the decedent's family tradition.

The majority suggests that a verdict cannot be directed when the factual issue of "contemplation of death" is involved. I disagree. The facts in this case clearly rebutted the presumption and overwhelmed the speculative inferences offered by the Government. I would affirm.

JUDGMENTS OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

January 23, 1970.

In No. 19,175.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for a new trial consistent with the opinion.

In No. 19,176.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the orders of the said District Court in this cause be and the same are hereby affirmed.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC.

February 19, 1970.

Before: CELEBREZZE, PECK and MCCREE, Circuit Judges.

The petition for rehearing of the plaintiffs-appellees in cause No. 19,175 and plaintiffs-cross appellants in No. 19,176 having come on to be considered, and less than a majority of the judges of this Court who are in regular

active service having favored ordering consideration en banc,

IT IS ORDERED that the petition be, and it is hereby denied.

STATUTES, REGULATIONS AND PROCEDURAL RULES.

The Statutes, Regulations and Procedural Rules here relevant are:

I. STATUTE TAXING GIFTS IN CONTEMPLATION OF DEATH.

The statute taxing transactions in contemplation of death, 26 U.S.C. 2035, with the portion thereof here particularly relevant italicized, reads as follows:

26 U. S. C. § 2035.

(As enacted Aug. 16, 1954, c. 736, 68A Stat. 381; Oct. 16, 1962, Pub. L. 87-834, § 18(a)(2)(C), 76 Stat. 1052.)

Transactions in contemplation of death.

(a) General rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein *of which the decedent has* at any time made a *transfer* (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, *in contemplation of his death.*

(b) Application of general rule.—If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or

exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

The 1962 amendment eliminated provisions which excepted real property outside the United States, and is not here relevant.

II. REGULATIONS AND PROCEDURAL RULES.

The Regulations and Procedural Rules of concern here, as they were in effect at the time of the Informal Conference Agreement and the subsequent repudiation thereof, with the portions thereof which are particularly important in the present case italicized, are as follows:

Regulations § 301.6213-1.

(As amended T.D. 6425, Nov. 11, 1959, 24 Federal Register 9193; T.D. 6585, Dec. 28, 1961, 26 Federal Register 12553.)

(d) Waiver of restrictions. The taxpayer may at any time by a signed notice in writing filed with the district director waive the restrictions on the assessment and collection of the whole or any part of the deficiency. The notice must in all cases be filed with the district director or other authorized official under whose jurisdiction the audit or other consideration of the return in question is being conducted. The filing of such notice with the Tax Court does not constitute filing with the district director

within the meaning of the Internal Revenue Code. *After such waiver has been acted upon by the district director and the assessment has been made in accordance with its terms, the waiver cannot be withdrawn.*

Regulations § 601.105.

(As amended Aug. 4, 1956, 21 Federal Register 5822; May 10, 1958, 23 Federal Register 3125; Feb. 14, 1959, 24 Federal Register 1155; Dec. 28, 1960, 25 Federal Register 13758; Dec. 29, 1961, 26 Federal Register 12688.)

(c) Informal conference procedure—(1) General. If the taxpayer does not agree with the findings of the examining agent, the taxpayer is advised in writing that he may present his objections to such findings *at an informal conference* in the Audit Division of the district director's office. The taxpayer is usually granted 10 days from the date of the written notice in which to request an informal conference on the proposed changes. Such request may be made by telephoning or writing to the number or address set forth in such written notice. If the taxpayer fails to request an informal conference within such time or to obtain an extension of time for requesting a conference, the examining agent will proceed with the completion of his report, a copy of which will be mailed to the taxpayer by the district director under cover of a "30-day letter" stating the action proposed to be taken. For further procedure in such a case, see paragraph (d) of this section.

(2) Scope of informal conference procedure. *The informal conference procedure* described in this paragraph *is applicable in the determination of any liability in respect of* income, profits, *estate*, gift, excise, or employment *taxes.* This procedure, however, is not applicable in the deter-

mination of liability for any excise tax imposed by subtitle E of the Internal Revenue Code (relating to alcohol, tobacco, machine guns and certain other firearms), or by subchapter D of chapter 78 (relating to certain import taxes) insofar as it relates to alcohol and tobacco. The procedure described in this paragraph does not apply in any case where criminal prosecution is under consideration, or in any case in which, in the discretion of the district director of internal revenue, the Government's interest would be prejudiced thereby. Nor does this procedure preclude the taking of appropriate action where the assessment or collection of the tax is in jeopardy. See paragraph (h) of this section.

(3) **Rules governing informal conferences.** *The objective of the informal conference* procedure is to give taxpayers greater opportunity *to reach* an early *agreement* with respect to disputed items arising from examinations made by internal revenue agents. *This procedure affords a means by which such issues may be resolved* prior to the preparation of the agent's final report and without the necessity of the taxpayer filing a formal protest. The examining agent will be present at the conference. If the taxpayer is represented by an attorney or agent, the rules with respect to their recognition and the filing of powers of attorney are applicable. For conference and practice requirements, see Subpart E. In the conduct of informal conferences, it is the duty of the group supervisor or other officer who may be acting as conferee to conduct the conference in accordance with the objectives of the informal conference procedure and to provide the taxpayer a fair and courteous hearing at which the taxpayer may present his statement of facts and his view of the issues; *to make certain that all pertinent facts are included in the record* and are considered in arriving at the proposed recommen-

dation; to make certain that the pertinent provisions of the Internal Revenue Code are applied in arriving at the proposed recommendation and that the proposed recommendation is in accord with the interpretations of the Internal Revenue Service as expressed in regulations and rulings; *and to explain fully to the taxpayer the conclusions reached and the reasons therefor.* It is the responsibility of the group supervisor or other designated officer to prepare a conference report with respect to each case on which an informal conference is held. This report, which will set forth briefly and concisely the facts and conclusions reached with respect to each issue, will be made available to the examining officer. In preparing his report the examining officer will give effect to the conference decisions. The examination report and the conference report are subject to review in the Audit Division of the district director's office. The purpose of this review is to insure uniformity in the application of the provisions of the Code, the regulations and rulings, as well as the general policy of the Service. In the event that *an agreement with the taxpayer is reached at the informal conference*, the taxpayer will be requested to execute Form 870 or other appropriate agreement form. Any deficiency in tax or additional tax proposed will then be assessed, or any overpayment will be credited or refunded.

(i) **Regional post review of examined cases.** Regional commissioners review samples of the examined cases closed in their district offices to assure uniformity throughout their districts in the application of the provisions of the Code regulations, and rulings, as well as the general policies of the Service. In certain circumstances, such as *where substantial errors are found* or where there is evidence of fraud or collusion, the *regional commissioner has authority to reopen the case.* When a re-exami-

nation of books and records is necessary, Form 2756, Notice of Re-examination, will be delivered to the taxpayer at the time the re-examination is begun.

Rev. Proc. 58-18, § 4.03.

(26 C. F. R. 301.6213-1; 1958-2 I. R. B. 1131.)

Advance payments received before the mailing of a statutory notice of deficiency *will not be assessed* in any case *where the District Director is unable to ascertain the amount of the deficiency* at the time the payment is received. An advance payment which is not assessed will be treated as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due. As such it will have no effect on the computation of interest or on the running of the period of limitation for filing a claim for refund and the taxpayer will be placed on notice by certified mail as to the status of the payment. *At such time as the amount of the deficiency is determined, an assessment will be made* and the advance payment will be applied as a payment of tax and/or interest made on the date of the assessment. Upon request by the taxpayer, *the deposit will be returned* to him, without interest, *at any time prior to assessment of the deficiency.* In this event the case will be processed as though no payment had ever been made.

Rev. Proc. 59-25.

(26 C. F. R. 601.105; 1959-2 C. B. 938.)

SECTION 1. PURPOSE.

.01 The purpose of this Revenue Procedure is to set forth the *conditions applicable to the reopening of cases* examined and closed in the office of a District Director of Internal Revenue.

SEC. 2. SCOPE.

.01 For the purpose of this procedure, *a closed case is any* income, *estate*, gift, excise or employment *tax return closed* by examination *in the office of the District Director, in which the taxpayer has been notified in writing by the District Director of the adjustment in tax* liability or the acceptance of the return as filed.

.02 *It also includes estate tax cases subject to post review even though the closing letter has not been issued.* It does not include any action pertaining to the reopening of cases or issues under the jurisdiction of the office of the Appellate Division or the Regional Counsel.

SEC. 3. BACKGROUND.

.01 Cases closed in the office of the District Director may be considered for reopening as a result of additional information received by the District Director's office. This information may come from within or outside the Internal Revenue Service.

.02 *Cases closed* in the office of the District Director *may* also *be considered for reopening as a result of errors disclosed by the regional post review.* Under the regional post review authority, delegated to the Assistant Regional Commissioner (Audit) at the time the National Office responsibility for that function was transferred to the regional offices, examined cases are reviewed to discover and identify the categories of most frequent procedural and technical errors in order to improve the quality, technical accuracy, and uniformity of the audit activity. The cases selected for post review from among those closed in the district are reviewed only after all administrative processing, including the assessment of additional taxes and the scheduling of overassessments, has been completed in the district office.

SEC. 4. CONDITIONS FOR REOPENING.

.01 It is the administrative practice of the Internal Revenue Service *not to reopen cases previously closed* by the District Director *unless there has been substantial error*, both in amount and in relation to the total tax liability, or there is evidence of fraud, malfeasance, collusion, concealment or the misrepresentation of a material fact. Reopening as the result of additional information received by the District Director's office must have the approval of the District Director, and reopenings recommended as a result of post review action must have the approval of the Assistant Regional Commissioner (Audit).

Rev. Proc. 60-24.

(26 C. F. R. 601.105; 1960-2 C. B. 998.)

SECTION 1. PURPOSE.

The purpose of this Revenue Procedure is to restate Revenue Procedure 60-16, page 940, this Bulletin, and add thereto the *procedure* applicable *when an agreement reached at an informal conference is upset* upon review.

SEC. 2. BACKGROUND.

.01 Revenue Procedure 56-34, C.B. 1956-2, 1396, which was superseded by Revenue Procedure 60-16, page 940, this Bulletin, announced the establishment of the position of Conference Coordinator in the larger district offices and modified prior informal conference procedures. Those changes were designed to provide effective direction and control of the informal conference function at the district office level. Revenue Procedure 60-16 announced certain improvements which were made in the informal conference procedures in the Audit Divisions of the office

of District Directors of Internal Revenue. *The objective* of these improvements *is to encourage more taxpayers* in unagreed cases *to avail themselves of informal conferences* than have done so under prior procedures.

02 Experience gained in the use of the procedures prescribed in Revenue Procedure 56-34 and results of further studies made in this area disclosed the need for expanding the Conference Coordinator position to all districts and adding further refinements to prior procedures *in order to encourage taxpayers* ~~now by-passing informal~~ conferences *to avail themselves of this opportunity to resolve unagreed issues.*

SEC. 3. SCOPE.

In general, the revised informal conference procedures apply both in field audit and office audit cases. The new *procedure encompasses* not only income tax cases, but also *estate*, gift, excise and employment *tax cases.*

SEC. 4. RESPONSIBILITY FOR THE INFORMAL CONFERENCE FUNCTION.

A full-time Conference Coordinator position has been established in each district which did not previously have such a position. In all district offices the Conference Coordinator is responsible for the direction and execution of the informal conference function under the supervision of the Chief, Audit Division. One or more full-time conferees will be assigned to the Conference Coordinator's Staff in every district that has a sufficient volume of work to warrant such assignments. From time to time, as need arises, other qualified technicians in the Audit Division may be temporarily assigned to the Conference Coordinator's Staff to hold informal conferences.

SEC. 5. REVISIONS IN PROCEDURE.

.01 In unagreed cases, the examining officer will, at the conclusion of the examination, prepare a statement of proposed adjustments. This statement will be mailed to the taxpayer, together with an appropriate informal conference invitation letter.

.02 The Conference Coordinator in each district will be responsible for the assignment of conferees to handle all informal conferences. These assignments will be made generally on the following basis:

(1) The Conference Coordinator will handle, or will assign a full-time member of his staff or another qualified technician in the Audit Division to handle informal conferences in all complex cases, in all cases in which the taxpayer requests that the conference be handled by a conferee who functions independently of the examining officer's group supervisor, and in all cases in which the examining officer's group supervisor disqualified himself as conferee due to his prior active participation in the case.

(2) The examining officer's group supervisor will normally be assigned to handle informal conferences in all other cases unless the best interests and rights of the Internal Revenue Service and the taxpayer would not be served thereby. However, in this type of case, the taxpayer will be informed that if he prefers he may instead request a conference with a conferee who will function independently of the examining officer's group supervisor. All such taxpayer requests will be honored by the Conference Coordinator.

.03 *In complex informal conference cases, taxpayers will be requested to submit a brief informal written state-*

ment setting forth the facts, rulings, or other data on which they rely. Although not required, such a statement would expedite the conference and assist the conferee in resolving the issues.

.04 Occasionally, in cases where an agreement is reached at an informal conference, review of the case will disclose that the conferee's decision was *based on a clearly defined error* having a substantial effect on the tax liability. In such instances, if the change necessary to correct the error is adverse to the taxpayer, he will be offered another informal conference in the matter with the Conference Coordinator. This offer may be made by a local telephone call or by a letter. If the change is in the taxpayer's favor, the tax liability will, of course, be appropriately adjusted.

III. ADMINISTRATIVE PROCEDURE ACT.

(Enacted June 11, 1946, 60 Stat. 238, and codified as 5 U.S.C. 1001 et seq., and amended and renumbered, September 6, 1966, 80 Stat. 381, as 5 U.S.C. 551 et seq.)

When the Administrative Procedure Act was amended, and the sections renumbered, on September 6, 1966, no substantive change was made by the amendments. The House Judiciary Committee, House Report No. 901, 89th Congress, 1st Session, said (p. 3): "There are no substantive changes made by this Bill enacting Title 5 into law." The report of the Subcommittee on Revision and Codification of the Senate Committee on the Judiciary, Sen. No. 1380, 89th Congress, 2d Session, similarly said (p. 18): "The purpose of this Bill is to restate in comprehensive form, without substantive change, the statutes in effect before July 1, 1965, that relate to Government employees, the organization and powers of

Federal agencies generally, and administrative procedure, and to enact Title 5 of the United States Code."

5 U.S.C. 1001(g).

"*Agency proceeding*" means *any agency process* as defined in subsections (c), (d), and (e) of this section. "*Agency action*" *includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.*

This provision was renumbered on September 6, 1966, as 5 U.S.C. 551(13), and now reads as follows:

> "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

5 U.S.C. 1002(a).

Every agency shall separately state and currently *publish* in the *Federal Register* (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including *the nature and requirements of all formal or informal procedures* available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations * * *.

This provision was renumbered on September 6, 1966, as 5 U.S.C. 552(a)(1), and now reads as follows:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> (A) descriptions of its central and field organization and the established places at which, the

employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing. * * *

5 U.S.C. 1005(d).

Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, *such notice shall be accompanied by a simple statement of procedural or other grounds.*

This provision was renumbered on Septemebr 6, 1966, as 5 U.S.C. 555(e), and now reads as follows:

Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in af-

firming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

5 U.S.C. 1009(b).

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute *or*, in the absence or inadequacy thereof, *any applicable form of legal action* (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. *Agency action shall be subject to judicial review in civil* or criminal *proceedings* for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

This provision was renumbered on September 6, 1966, as 5 U.S.C. 703, and now reads as follows:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. 1009(c).

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *.

This provision was renumbered on September 6, 1966, as 5 U.S.C. 704, and now reads as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. * * *.

5 U.S.C. 1009(e).

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) *hold unlawful and set aside agency action,* findings, and conclusions *found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;* (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) *without observance of procedure required by law;* (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise

reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. *In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party,* and due account shall be taken of the rule of prejudicial error.

This provision was renumbered on September 6, 1966, as 5 U.S.C. 706, and now reads as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.